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IN THE

Supreme Court of the United States

WESTERN COAL TRAFFIC LEAGUE, *Petitioner,*

v.

SURFACE TRANSPORTATION BOARD
and UNITED STATES OF AMERICA, ET AL., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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July 19, 1999

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred through its failure to review interpretations and applications of Court precedent which the Surface Transportation Board used to create a new exception to the common carrier obligations of railroads, which new exception, in the court's words, permits railroads to **exploit** captive consumers.

PARTIES TO THE UNDERLYING PROCEEDING

The parties to the underlying proceeding included the Western Coal Traffic League ("Western Coal") and the following other entities with similar interests: Central Power & Light Company, MidAmerican Energy Company, Pennsylvania Power & Light Company, and the National Industrial Transportation League. In addition, the following parties to the underlying proceeding had interests that were adverse to those of Western Coal: The Surface Transportation Board, the United States of America, the Association of American Railroads, Union Pacific Corporation, Southern Pacific Transportation Company, Norfolk Southern Railway Company, CSX Transportation, Inc., and Consolidated Rail Corporation.

Petitioner, Western Coal, is an unincorporated trade association of consumers of coal mined in the western United States. Western Coal has no parent, subsidiary or affiliate corporations, and does not issue shares of stock to the public. Its members are as follows:

Arizona Electric Power Cooperative, Inc.
Central and South West Services, Inc.
City Public Service Board of San Antonio
Cleco Corporation
Colorado Springs Utilities
Fayette Power Project, Austin, Texas
Kansas City Power & Light Company
MidAmerican Energy Company
Minnesota Power, Inc.
Nebraska Public Power District
Omaha Public Power District

Reliant Energy, Incorporated
Western Resources, Inc.
Wisconsin Public Service Corporation

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Western Coal petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS OF THE COURT OF APPEALS AND THE SURFACE TRANSPORTATION BOARD

The February 10, 1999 opinion of the Court of Appeals is reported as *MidAmerican Energy Co. v. Surface Transportation Board*, 169 F.3d 1099 (8th. Cir. 1999), and

appears as Appendix A to this Petition.[1] A timely petition for rehearing and rehearing en banc was denied by the Court of Appeals in an order dated April 20, 1999, not officially reported, which is attached hereto as Appendix D. The December 31, 1996 and April 30, 1997 decisions of the Surface Transportation Board jointly issued in its Docket No. 41242, *Central Power & Light Co. v. Southern Pac. Transp. Co.*, Docket No. 41295, *Pennsylvania Power & Light Co. v. Consolidated Rail Corp.*, and Docket No. 41626, *MidAmerican Energy Co. v. Union Pac. R.R.*, which were affirmed in part by the Court of Appeals appear, respectively, in Appendices B and C.[2]

JURISDICTION

The Court of Appeals entered judgment in this case on February 10, 1999. This is the same date on which the Court issued its opinion. *See* Pet. App. A-6. The Court entered its order denying rehearing (Appendix D) on April 20, 1999. This Petition for Certiorari is thus timely filed under 28 U.S.C. § 2350. Western Coal invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, enacted December 29, 1995 ("the Termination Act"), abolished the Interstate Commerce Commission and transferred certain functions and proceedings to the Surface Transportation Board. Section 204(b)(1) of the

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[1] The appendices are separately bound in a companion volume and are cited as "Pet. App. __."

[2] Central Power and Light and MidAmerican are members of Western Coal. Pennsylvania Power and Light settled its dispute prior to the proceedings before the Eighth Circuit.

Termination Act provides that proceedings pending before the ICC on the effective date of the Termination Act shall be decided under law as in effect prior to that date (*i.e.*, the Interstate Commerce Act or "the Act") insofar as the proceedings involved functions retained by the Board after the Termination Act. Both the Interstate Commerce Act and the Interstate Commerce Commission Termination Act are set forth at Subtitle IV of Title 49 of the United States Code.

Among the regulatory functions retained in the Termination Act is the power to set maximum reasonable rates. *Id.* at § 102(a), 109 Stat. at 810-811 (amending *Former* 49 U.S.C. § 10704(a)(1)). Section 204(b)(1) further provides with regard to proceedings pending on the effective date of the Termination Act that "appeals shall be taken therefrom . . . as if this Act had not been enacted." Because the proceedings at issue here were pending with the ICC when the Termination Act became effective, the earlier law is applicable to this case. Citations herein to relevant portions of Title 49 therefore will be to the statute in effect as of December 29, 1995.

The most relevant portions of the Act involved in this case include *Former* 49 U.S.C. § 11101(a), *Former* 49 U.S.C. § 10701a, and *Former* 49 U.S.C. § 10704(a)(1). These statutes are set forth in Appendix E.[3]

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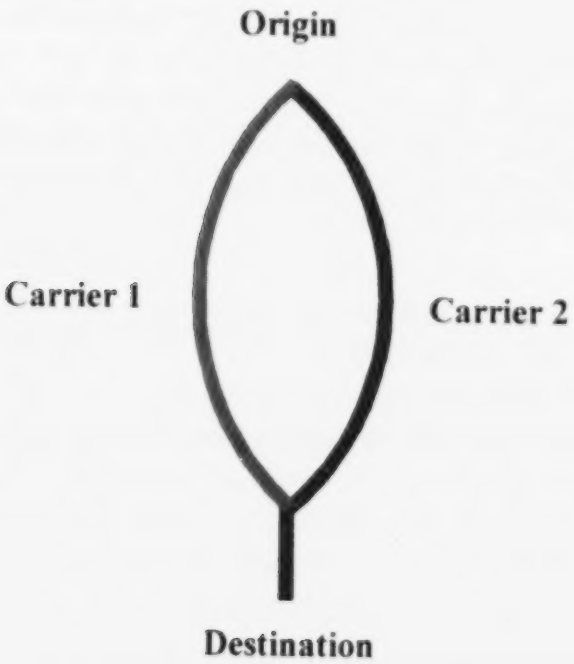
[3] These same provisions of the Act have been carried forward into to new version of Title 49 by virtue of the Termination Act. *See New* 49 U.S.C. § 11101(a); *New* 49 U.S.C. § 10701(c), (d); and *New* 49 U.S.C. § 10704(a)(1).

STATEMENT OF THE CASE

1. Emergence of Railroad Bottlenecks

This case involves the common rail transportation circumstances of three separate electric companies ("utilities") located in Texas, Iowa and Pennsylvania. Each utility could originate the transportation of its substantial coal purchases by two or more railroads, but each could deliver the coal to its generating facility by only one railroad. In railroad parlance, this circumstance (multiple origin carriers, but only a single destination carrier) has become known as a "bottleneck" situation. The following graphic depicts a typical rail bottleneck of the sort in issue in the cases below:



An extensive discussion of how railroad coal transportation bottlenecks operate appears in *Western Resources, Inc. v.*

Surface Transportation Board, 109 F.3d 782, 786 (D.C. Cir. 1997) ("*Western Resources*").

For most of their history, the nation's railroads engaged exclusively in the rendition of common carrier transportation services. All common carrier freight rates were set forth in public tariffs which were comprehensively regulated by the Interstate Commerce Commission. Bottleneck trackage existed in the common carriage era but it was not a problem because the pervasive federal regulation of railroad rates tended to equalize all rail rates for a given commodity.

Beginning in 1976, Congress began to change the railroad landscape through deregulation. To foster competition between railroads, Congress, for the first time, authorized the use of contract rates which were exempted from regulation. By the early 1990s, unregulated rail contract carriage had largely supplanted common carriage. While the common carrier system remained in tact, it was not well patronized. One of the principal features of the common carriage system is the legal requirement that rates be reasonable.[4] Where a railroad enjoys a monopoly, defined in the law as "market dominance," the Surface Transportation Board ("Surface Board") continues to possess the authority to find a particular railroad rate unreasonable and to prescribe a lower and more reasonable one in its place. *See Western Coal Traffic League v. United States*, 694 F.2d 378 (5th Cir. 1982), *on reh'g*, 719 F.2d 772 (5th Cir. 1983), *cert. denied*, 466 U.S. 953 (1984).

Because their generating stations were each located at a bottleneck destination, the utilities were unable to access the

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[4] *Former* 49 U.S.C. § 10701(a).

new reduced rail rates which had emerged at the origins following deregulation. This was so as a consequence of the "one-lump theory" which enables "a monopolist at the end stage of production ... to capture the entire profit". *Western Resources*, 109 F.3d at 787. To lessen their exploitation by the bottleneck railroads, the utilities sought to invoke the Surface Board's regulatory oversight by persuading it to establish reasonable rates over the bottlenecks.[5] These reasonable common carrier rates could then be used by the utilities in combination with competitive contract rates from the origin mines to the points of the bottlenecks to deliver their coal purchases; thereby lowering the overall costs of each utility's coal transportation expense.

2. The Surface Board's Disposition of The Bottleneck Cases

The emergence, after 1980, of a new, competitive, non-homogeneous railroad rate structure restored the currency of the Court's cases which set forth the rules for challenging railroad rates, especially segments of rates. In separate proceedings before the Surface Board, the utilities asked for the prescription of maximum reasonable rates over the bottleneck line segments serving their generating facilities. The bottleneck railroads resisted the electric companies and contended that the law, as illuminated by the Court, did not permit the utilities to challenge their local, bottleneck rates. Rather, contended the railroads, the only challenges permitted by law were challenges of their rates for the entire movements from origins to destinations. Because the statutes are inexplicit in this respect, the railroads based their position before the Surface Board primarily on the decisions in *Baltimore &*

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[5] For example, on one bottleneck in Texas, the railroad rate for coal movements was thirty (30) times greater than a reasonable rate. *See* Pet. App. A-9 n.4.

O. S.W. R.R. v. Settle, 260 U.S. 166 (1922) ("*Settle*"); *Louisville & N. R.R. v. Sloss-Sheffield & Iron Co.*, 269 U.S. 217 (1925) ("*Sloss-Sheffield*"); *Great Northern Co. Ry. v. Sullivan*, 294 U.S. 458 (1935) ("*Great Northern*"); and *Thompson v. United States*, 343 U.S. 549 (1952) ("*Thompson*").

In August of 1996, after the bottleneck cases had been pending before it for two years, the Surface Board took the extraordinary step of consolidating the separate adjudicatory proceedings to allow public input on an issue the Surface Board described as having paramount "industry-wide significance for rail carriers and shippers" -- its power to prescribe bottleneck rates. Pet. App. B-7. In response to the Surface Board's invitation, numerous new parties participated in the proceedings and the Surface Board received voluminous written comments, testimony, and oral argument.

On December 31, 1996, the Surface Board issued a decision in which it dismissed the utility cases. In this decision, the Surface Board endorsed the basic legal position advanced by the railroads In supporting the railroads' thesis that their bottleneck rates could not be challenged where the railroads also offered rates for the entire service from origin to destination, the Surface Board found support in the same Court rulings advanced by the railroads while rejecting the clear support for the positions of the utilities set forth in *Atchison, T. & S.F. Ry. v. United States*, 279 U.S. 768 (1929) ("*Santa Fe*").

In its decision to dismiss the cases of the utilities, the Surface Board was careful to underscore the fact that its decision only reflected the requirements of the law and did not take into account the various policy and economic grounds which had been advanced by the parties. Pet. App. B-21

n.21. The Board made this disclaimer again following court review.[6]

The Surface Board's decision, as subsequently clarified, strips away the ability of captive shippers to benefit from newly emerged competition over non-bottleneck rail line segments by foreclosing the attempts of the utilities to limit the bottleneck carriers' monopoly pricing powers to the bottleneck line segments.

3. The Decision of the United States Court of Appeals for the Eighth Circuit

Upon review,[7] the Court of Appeals affirmed the Surface Board's decision to dismiss the utilities' complaints. Significantly, however, the Court of Appeals upheld the Board's decision on the basis of a policy rationale that the agency had expressly disavowed while it failed completely to review the seriously flawed legal analysis of Court precedent relied upon by the agency as the basis for its decision. Despite the fact that the parties before the lower court exhaustively developed their conflicting interpretations of

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[6] *See* Surface Board Press Release, "Surface Transportation Board Announces Favorable Appeals Court Ruling Affirming 'Bottleneck' Decisions," at 2 (issued February 11, 1999) ("[T]he Board's decisions were premised entirely on these legal grounds . . .").

[7] The panel initially assigned to hear this case consisted of Circuit Judges Henley and Hansen, and District Judge Stevens. Shortly before the oral argument, Judge Henley died and Judge Wollman replaced Judge Henley on the panel. Judges Hansen, Wollman and Stevens heard the argument on November 18, 1997. Following the argument, but prior to the issuance of the panel's decision on February 10, 1999, Judge Stevens died. The panel opinion, by Judge Wollman, states at the outset that "[t]his opinion is consistent with the views [Judge Stevens] expressed at our post-argument conference." Pet. App. at A-7 n.1.

Court decisions on brief and in a ninety minute oral argument, the court ignored these issues in its decision.

In resolving the dispute before it, the court below, in the words of one prominent legal commentator, "misunderstood the grounds for the Board's decision."[8] Instead of grappling with the conflicting constructions and applications of the Court's authorities which lie at the heart of this case, the lower court opted to affirm the dismissal of the utility complaints on the very policy and economic grounds disclaimed by the agency. While the court correctly acknowledged a dearth of direct statutory guidance, it erroneously proceeded to affirm on the grounds of policy and agency expertise while ignoring completely the Surface Board's flawed application of Court precedent:

> Nothing in the Act explicitly requires carriers to provide separate local rates for bottleneck service. Furthermore, requiring carriers to provide separately challengeable rates on bottlenecks would prevent them from **exploiting bottlenecks** and charging rates up to SAC [stand-alone cost] for complete origin-to-destination service. In the Board's view, this would impede the industry's efforts to achieve revenue adequacy, which is necessary for long-term capital investment and, ultimately, for a safe and efficient rail system. The Board therefore properly reconciled the competing policies of the Act when it deferred to carrier discretion in setting routes and rates and held

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[8] Richard A. Allen, *Court Decisions*, 66 J. Transp. L., Logistics and Policy 355 (1999) ("*Court Decisions*").

> that carriers are not required to provide separately challengeable bottleneck rates.

Pet. App. A-23 (emphasis added). The decision described and affirmed by the court is not the same decision authored by the Surface Board. The Surface Board, in its decision, and in its defense of its decision before the Court of Appeals, emphasized that its dismissal of the utilities' cases was rooted in the requirements of the law as defined and propounded by the Court -- not policy and economics.

The Court has emphasized that an appellate court must review a decision and affirm or reverse that decision based upon the grounds articulated by the agency. "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Moreover, it is a cardinal rule of administrative law that a reviewing court may not affirm an agency decision on the basis of a rationale the agency itself did not adopt. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Had the court below engaged in a careful review of the Surface Board's application of the Court's precedents, it could not have affirmed. Instead, it would have been compelled to find that the utilities' local rate challenges were expressly supported by the Court's decision in *Santa Fe* and that the authorities relied upon by the Surface Board were inapplicable. The Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) is not a license for circuit courts to abdicate their responsibilities under 28 U.S.C. §§ 2321 and 2342(5).[9]

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[9] *Western Coal Traffic League v. Surface Transportation Board*, 169 F.3d 775, 778 (D.C. Cir. 1999).

The failure of the court below to engage in precise judicial review has left in disarray and disorder a carefully crafted framework of Court rulings which have served the nation well and long in molding the manner in which railroads render their essential services. The direct consequence of the error of the court below is the creation of a new order wherein railroads, for the first time in history, are legally sanctioned to economically exploit their captive customers as a means to achieving their own adequate revenues. Pet. App. A-18-19.[10]

REASONS FOR GRANTING THE PETITION

This case raises what has been described as "the crucial issue of railroad regulation today."[11] The issue is whether a railroad can perpetuate its monopoly over a long-haul movement of goods by lawfully refusing to offer separate rates and services for the local, terminal portion of the longer movement (*i.e.*, the bottleneck). This case presents, in the context of surface transportation, the kinds of issues which were before the Court in the telecommunications field in *AT&T Corp. v. Iowa Utilities Board*, __ U.S. __, 119 S.Ct. 721, 748 (1999) (Breyer, J., concurring in part, dissenting in part). According to the Surface Board, in deciding for the railroads: "The Board reaffirmed existing law that a shipper could not, as a matter of course, demand that railroads treat their mine-to-generating plant coal shipments as a series of

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[10] Despite its recent eclipse as a litigant in disputes before the Court, the railroad industry continues as a major industrial force with annual revenues of $35 billion. *See* Morgan Stanley Dean Witter, *U.S. and the Americas Investment Research: Railroads*, at 3 (April 1, 1999).

[11] Richard A. Allen, *Court Decisions*, *supra*, at 355.

separate movements whose rates could be separately challenged."[12]

The "existing law" which the Surface Board claims to have reaffirmed in its decision (and which the court ignored), appears primarily in the decisions of the Court in *Santa Fe* and *Great Northern*, as well as in the related cases upon which the Surface Board relies.[13] These decisions articulate the legal rights and obligations of common carrier railroads under the Interstate Commerce Act. One reason why review by the Court is urgently needed is that not only does the decision of the Surface Board not reaffirm the law as defined by the Court, it so distorts and misapplies the Court's precedents that the result is a situation which would be abhorrent to the Congress -- the exploitation of monopolies by railroads.

In the proceedings before the Surface Board, the electric companies argued that the fundamental obligations of common carriers to the shipping public under the Act, as defined by the Court, required the bottleneck railroads to offer them local service at reasonable rates over the bottleneck routes. *Former* Title 49 provides broadly that railroads shall provide common carrier transportation to the public upon request. *Former* 49 U.S.C. § 11101(a). The Court has held that the common carrier obligation of railroads to carry all goods offered for transportation "is comprehensive and exceptions are not to be implied." *American Trucking Ass'ns v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 407 (1967). In

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[12] Docket Nos. 97-1081, et al., *MidAmerican Energy Co. v. Surface Transportation Board*, Joint Brief of Respondents Surface Transportation Board and United States of America, at i (July 28, 1997).

[13] *See, e.g., Thompson, Sloss-Sheffield*, and *Settle*, etc.

Thompson, the Court stated clearly that a railroad has a duty to offer rates and provide services "between points on its own lines." 343 U.S. at 558.

The decisions below eviscerate the common carrier obligations of railroads to carry freight between any points on their lines through the creation of new exception to that heretofore comprehensive obligation. The new exception which the Surface Board has created in this case holds that a railroad shall be relieved of its obligation to transport freight between any two points on its lines if it elects instead to offer a more comprehensive rate and service which includes the two points preferred by the customer.

There is no language in the Act which explicitly supports the new legal thesis of the Surface Board. As we have explained, the Surface Board instead relies upon several decisions of the Court to support its new exception. Because the Surface Board has misunderstood the Court precedent upon which it relies, its new exception to the common carrier obligation is, in fact, unsupported by the Court authorities upon which it relies and in clear conflict with other seminal rulings of the Court.

The lynchpin in the conflict between the law as set forth in the Court's decisions in *Settle, Great Northern*, etc. and the new interpretations of those decisions by the Surface Board lies in the Surface Board's failure to grasp the distinction between the transportation facts and circumstances before the Court in those cases and the circumstances of the utilities here. The rulings of the Court in *Settle, Great Northern*, etc. each dealt with "through routes and rates" under Section 10705 of the Act (*Former* 49 U.S.C. § 10705), a statutory

term of art.[14] Generally speaking, the Court ruled in these cases that through railroad rates could not be unbundled into their separate segments and separately challenged.

Here the utilities contemplate movements via a combination of contract and common carrier rates. While the utilities contemplate through movements or through shipments, the facts of their cases do not implicate through rates and routes or the law associated therewith. The Court has long recognized that through shipments may exist with "no through rate and no through route . . ." *Baer Bros. Mercantile Co. v. Denver & R.G.W Co.*, 233 U.S. 479, 490 (1914).[15] The Surface Board's error lies in its transposition of Court authorities precluding the segmentation of through rates to movements involving rates which are used for through shipments but which are not "through rates" as defined by the statute or as treated in the Court decisions upon which the Board erroneously relies.

Because the Surface Board has misapplied the Court's pronouncements on through rates in *Settle, Sloss-Sheffield, Great Northern,* etc. to the movements of the utilities, its decision stands in direct conflict with other long-standing Court precedent which directly authorizes rail rate challenges of the exact kind which the utilities attempted and which the Surface Board rejected as a consequence of its misplaced reliance on the through rate cases of the Court.

In *Santa Fe,* the Court considered rate challenge issues which were nearly identical to the issues involved in the

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[14] *See Through Routes and Through Rates*, 12 I.C.C. 163 (1907).

[15] *See also Pennsylvania R.R. v. Pub. Util. Comm. of Ohio*, 298 U.S. 170, 175 (1936).

utility cases. Specifically, in *Santa Fe*, the Court had before it separate railroad rates which were combined for through shipments. As the Court explains (*see* 279 U.S. at 771 n.1, 773 n.3), where a local railroad rate is used in conjunction with another separate rate, the second rate is referred to as a "proportional" rate, and is distinct from a through rate. In rejecting railroad arguments in this situation against a separate rate challenge to one of the segments in such a movement, Justice Brandeis explained:

> The Commission's power to declare rates unreasonable applies alike to all rates, be they joint, local, or proportional. The Commission may, and in controversies involving through rates often does, deal with one factor only of the combination of rates which make up the through rate, and that factor may be a proportional rate.

279 U.S. at 776.

The Court's ruling in *Santa Fe* clearly supports the lawfulness of the challenges made by the utilities against the local bottleneck rates.[16] Despite the unequivocal clarity of Justice Brandeis' formulation of the law, the Surface Board failed to heed it because of its misunderstanding of another Court decision. The Surface Board reads the later decision of the Court in *Great Northern* as requiring challenges of the entire origin-to-destination rate and not merely the local,

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[16] "[T]he overwhelming weight of authority now is to the effect that the Commission has jurisdiction to consider the lawfulness of a separately established rate on its own merits and without regard to the through charges." Charles W. Berry, *A Study on Proportional Rates*, 10 I.C.C. Pract. J. 545, 566 (1943).

bottleneck segment. Here, the Surface Board's error lies in its failure to appreciate that in *Santa Fe* the Court was treating the prospective lawfulness of a rate, which was the issue in the utilities' cases, whereas in *Great Northern* the issue was a refund for unlawful past charges. The Surface Board ignored this crucial distinction which the Court explained as follows:

> [The ICC] may determine whether a proportional constituting a part of a combination rate violates section 1 without passing upon the validity of the rate as a whole. *Atchison, T. & S.F. Ry. v. United States*, 279 U.S. 768, 776, 49 S.Ct. 494, 73 L. Ed. 947. But the commission may not order or permit payment of damages by way of reparation without finding that the amount of the charge was unjust and unreasonable.

Great Northern, 294 U.S. at 462-63.[17] The Surface Board's illogical reconciliation of the Court's holdings in *Santa Fe* and *Great Northern* so as to permit the exploitation of monopolies is hopelessly in error. The court below not only did not correct the Surface Board's error, it failed even to address it.

The United States, alone amongst major industrialized nations, enjoys efficient railroad transportation services provided by the private sector. Our efficient national rail transportation system, which is vital to the economy and the national defense, owes its robust existence in large part to the

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[17] The Surface Board compounds its error by attempting to further distinguish *Santa Fe* by its absurd claim that *Santa Fe* authorizes challenges to local rates by other railroads, but not by railroad customers. *See* Pet. App. B-22-23.

roughly 400 decisions of the Court which have spelled out the specifics of the regulatory provisions which the Congress cast in general terms.[18] As the Court has observed, the complexities of railroad regulation require the Court to partner with the Congress in order to foster an efficient and fair national transportation system by spelling out the details of the generalities set forth by Congress in the Act. *See United States v. Pennsylvania R.R.*, 323 U.S. 612, 616 (1945). The decisions below by interpreting the past rulings of the Court so as to sanction the exploitation of captive consumers, corrupt the regulatory system architected by Congress and defined by the Court. The issue is of considerable financial consequence to the nation.[19] Its mishandling by the lower court has spawned intense, and we submit, needless Congressional activity in the form of hearings[20] and remedial legislative proposals.[21]

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[18] *See* 1-3 Association of Interstate Commerce Commission Practitioners, *Abstracts of Supreme Court Decisions Interpreting the Interstate Commerce Act* (1954, 1965, 1972).

[19] The railroads claim that annual revenue of some $2.4 billion is at stake at their bottlenecks. *See* Pet. App. B-21 n.21.

[20] *See, e.g., Hearing on the Reauthorization of the Surface Transportation Board before the Senate Subcommittee on Surface Transportation and Merchant Marine*, 105th Cong. (March 2, 1999) (unprinted); *Reauthorization of the Surface Transportation Board: Hearings Before the Subcommittee on Transportation and Infrastructure (105-58)*, 105th Cong. (hearings held March 12, 1998, Apr. 12, 1998, and May 6, 1998); *Reauthorization of the Surface Transportation Board: Hearing Before the Subcommittee on Surface Transportation and Merchant Marine of the Committee on Commerce, Science, and Transportation*, 105th Cong. (hearing held March 31, 1998) (unprinted).

[21] *See Railroad Competition and Service Improvement Act of 1999*, S. 621, 106th Cong. § 5 (1999); *Surface Transportation Board*

(continued...)

A more efficient use of our governmental resources would be the Court's return to the railroad arena to review the application of its precedents to the changed circumstances of the industry. Such a review would address for the first time the issues which the lower court ignored and it also would resolve an important national transportation legal issue in the context of the careful framework laid down over many years by the Court.

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[21](...continued)
Reauthorization and Improvement Act of 1999, S. 747, 106th Cong. § 7 (1999); *Surface Transportation Board Amendments of 1998*, S. 2164, 105th Cong. § 8 (1998); *Railroad Shipper Protection Act of 1997*, S. 1429, 105th Cong. § 6 (1997); *see also* 145 *Cong. Rec.* S3485-S3486 (daily ed. March 25, 1999) (statement of Senator Hutchison); 145 *Cong. Rec.* S2674-S2678 and S2680-S2681 (daily ed. March 15, 1999) (Statements of Senators Rockefeller, Dorgan, and Burns); 143 *Cong. Rec.* S21018-S21020 (daily ed. Nov. 7, 1997) (statement of Senator Rockefeller). These bills have been introduced because the sponsoring members of Congress believe the Surface Board is misapplying current law.

CONCLUSION

As we have demonstrated, venerable precedents of the Court have been misused to undermine competition and promote monopoly. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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